United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

74-1778

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Pages
6

To be argued by
MEL P. BARKAN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1778

CORWIN CONSULTANTS, INC.,
Petitioner-Appellant,

—v.—

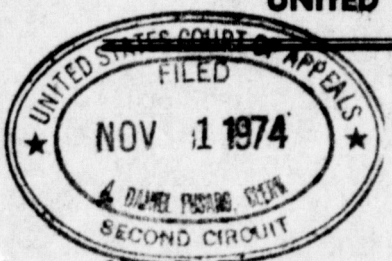
UNITED STATES OF AMERICA,
Respondent-Appellee,

—and—

SAMUEL A. CULBERTSON, II,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE UNITED STATES OF AMERICA



PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America, Respondent-Appellee.

MEL P. BARKAN,
GERALD A. ROSENBERG,
Assistant United States Attorneys,
Of Counsel.

3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTES INVOLVED

PAGE

OTHER AUTHORITIES

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SAMUEL A. CULBERTSON, II,
Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLEE UNITED STATES OF AMERICA

Issue Presented for Review

Did the District Court properly hold that the Internal Revenue Service (IRS) perfected, as against a later judgment lien creditor, its lien for unpaid Federal income taxes of $168,895.90 owed by a transient taxpayer without a verifiable residence, after the IRS had made diligent efforts to locate him, when the IRS filed Notices of Federal Tax Liens at the transient taxpayer's two most recently known addresses and where one of those places was also the situs of the property to which the tax liens attached and the single best place in the country to give competing judgment or other creditors notice of the tax liens?

Judgment Appealed

Corwin Consultants, Inc. (Corwin) and Samuel A. Culbertson, II (Culbertson), both judgment lien creditors of Marion Harper, Jr. (Harper), appeal from the judgment (161-165a)* of the United States District Court for the Southern District of New York (Honorable Morris E. Lasker) which ordered The Interpublic Group of Companies, Inc. (Interpublic) to pay all installments which were then due and those which might become due to the transient taxpayer, Harper, pursuant to a certain contract between Interpublic and Harper dated February 1, 1968, to the United States of America until the Federal income taxes owed by Harper for the year 1968, 1963, 1964 and 1965 and all statutory additions thereto ($441,637.73 as of November 1973) (159a) were paid in full. The Judgment further ordered that, after completion of all payments for Federal taxes, Interpublic pay to its attorneys the sum of $8,187.30. No party objected to this award so long as it came *after* payment to the Government.** The Judgment awarded an inferior priority to the future payments pursuant to the contract, if any, by Interpublic to the following creditors in the following order:

Third priority —Corwin to the maximum extent of $52,346.00 plus interest.

Fourth priority—Culbertson to the maximum extent of $608,180.90 plus interest.

Fifth priority —Cowles Communications, Inc. to the maximum extent of $56,820.54 plus interest.***

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* Page references followed by the letter "a" are to the Appellant's Appendix.

** Neither Interpublic nor its attorneys have appealed.

*** Cowles Communications, Inc. has not appealed.

After entry of the Judgment, Corwin applied to the District Court for a stay pending appeal. The District Court denied the application and Corwin did not apply to this Court for similar relief. On May 23, 1974, Interpublic paid $224,999.70 to the Government which represented all of the accumulated installments then due Harper pursuant to the 1968 contract. Since that date, Interpublic had made five monthly installment payments on the 15th of each month in the amount of $8,330.00 pursuant to the terms of the contract ($41,650.00) or a total as of this date (November 1, 1974) of $266,649.70.

As of November 1, 1974, Harper's liability for 1968 Federal income taxes has been reduced to zero, and with statutory addiitons, his income tax liabilities for 1963, 1964 and 1965 are now $186,873.41. It is the priority of the federal tax liens wtih respect to this amount that is in issue on this appeal.*

Facts

The Contract

On or about February 1, 1968, Harper and Interpublic entered into an agreement whereby Harper severed all connection with Interpublic or any of its subsidiaries. As part of the agreement, Interpublic repurchased all shares of Interpublic stock owned by Harper. Interpublic also agreed to pay Harper in the following manner in consideration for Harper releasing Interpublic from and terminating his employment contract with Interpublic:

> Harper (or his heirs or assigns) shall be paid by the Company monthly on the fifteenth of every month beginning February, 1968 for the calendar

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* Corwin has dropped a number of spurious arguments put forward in and rejected by the District Court regarding the priority of the assessment for 1968 taxes which has now been reduced to zero.

year 1968, the sum of $20,420 and for the next ninety-six months the sum of $8,333, except that if Harper shall die at any time prior to January 1, 1969, no payment shall be made for January 15, 1969 or any month thereafter but $100,000 shall be paid to his estate or as he shall by will direct in equal monthly installments for sixty months commencing with the first day of the month following the month in which he died. If Harper should die on or after January 1, 1969 but prior to December 31, 1975, no further monthly payment shall be made except that $100,000 shall be paid in like installments to his estate or as he shall by will direct. If Harper should die on or after January 1, 1976, the payments that would have been made to Harper if he had lived shall be paid in like installments to his estate or as he shall be [*sic*] will direct."

As part of the contract, Harper also agreed not to compete with Interpublic and not to reveal any trade secrets (18a-30a).

All parties to this lawsuit, aside from Interpublic, are creditors of Harper who sought in the District Court a determination of the lien priorities on the installments which pursuant to the contract had become due and owing to Harper ($175,000 as of November 16, 1973) and those which in the future would become due and owing to Harper.

Harper's Creditors

The United States assessed the taxpayer Harper on November 28, 1969 for 1968 income tax in the amount of $403,385.84 (85a; 91a-93a).

Notice of the federal tax lien for this liability (reduced slightly by partial payment) was filed on April 15, 1970 with the County Clerk of Westchester County, New York, the county in which Harper then resided (85a; 94a).

Notices of the same federal tax lien for this 1968 liability were filed wtih the County Clerk of Westchester County and the Register of the City of New York on January 12, 1971, this time in the further reduced principal amount of $373,730.50. Statutory additions to that date amounted to $23,193.15, making the total 1968 liability then due $396,923.65. Harper resided in either or both counties on that date and the situs of the debt due from Interpublic was in New York County (84a). On or about January 12, 1971, Interpublic was given notice of the aforesaid tax liens by the Internal Revenue Service (85a; 95a-99a).

Additionally, Harper became indebted to the United States for 1963, 1964 and 1965 income taxes in the total amount of $168,895.90 plus statutory additions which were assessed on September 29, 1972 (86a; 100a-102a).

Notice of federal tax lien for said liabilities were filed on October 3, 1972 at 10:32 A.M., with the Register of the City of New York. It is undisputed that the situs of the debt remained and still is New York City (86a; 103a-104a).

On October 3, 1972, at 11:17 A.M., Interpublic received notice of all the aforesaid tax liens and on October 18, 1973, the I.R.S. served Interpublic with a final demand for payment (86a; 105a-107a).

Also on October 3, 1972, at 11:42 A.M., the I.R.S. filed a Notice of Federal Tax Lien for Harper's 1963, 1964 and 1965 tax liabilities with the Oklahoma County Clerk, Oklahoma City* (132a-133a; 135a-136a).

Notices of Federal Tax Liens were filed in both New York City and Oklahoma City as a result of recent diligent

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* There was no time difference between Oklahoma City and New York City on October 3, 1972 (133a).

efforts by agents of the I.R.S. to locate Harper in order to enforce Harper's various tax liabilities. Their investigation indicated that Harper, between June 30, 1971 * and October 3, 1972 (the date of the IRS filings), had lived in several hotels (132a) and had given several addresses which were discovered by the IRS agents, including:

1) Waldorf Towers
   New York City

2) Metropolitan Club
   New York City

3) c/o Lane
   280 Madison Avenue
   New York City

4) New York Sheraton Hotel
   New York City

5) 1501 N.W. 20th Street
   Oklahoma City

By the summer and fall of 1972 Harper could be characterized only as itinerant or transient. (*Ibid.*) There is no dispute that Harper, on October 3, 1972, was without a specific verifiable address at which he could be located (146a-147a). Five days prior to October 3, 1972, the date of the multiple filings, IRS Agent Gerald Snyder examined the records of the New York Sheraton Hotel located at 55th Street and Seventh Avenue in New York City. He discovered that Harper had stayed at that hotel from August 28, 1972 to September 13, 1972. The hotel's registration card was written in Harper's own hand and signed by him. Harper stated on that card that his "Home" was 1501 N.W. 20th Street, Oklahoma City, Oklahoma ** (132a-133a).

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* The date on which Harper's home in Westchester was sold (131a).

** This, it turns out, was also the home of Harper's parents.

Thus, the most current information available to the IRS after a diligent and recent investigation to determine Harper's whereabouts indicated that his last known residence was a hotel in New York City to whom he signed a statement which said that his "home" was in Oklahoma City. The IRS filed the Notices of Federal Tax Liens in the counties encompassing Harper's two last-known addresses. The Southern District of New York also was the situs of the property sought as well as the jurisdiction in which the five judgment creditors of Harper had obtained and perfected their judgments.* It was unquestionably the best place to give notice of the tax liens to competing creditors of Harper.

Only hours after the IRS filed its Notices of Federal Tax Liens in New York City and Oklahoma and gave Interpublic notice of the lien, Corwin, a New York judgment creditor which had obtained its judgment months earlier (on May 23, 1972), perfected its lien on Harper's personal property by delivering to the Sheriff of New York County an Execution on October 3, 1972, at 12:51 P.M. (143a).** Thus, if Corwin had been more diligent in perfecting its judgment lien, we would not be here today.***

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* Other than Corwin and Culbertson, two judgment creditors, Peter M. Moffit and W. Denning Harvey, whose respective judgments against Harper were satisfied, did not participate in this action although they were served with papers (40a). Cowles Communications, Inc., which was granted the last priority by Judge Lasker, does not appeal.

** See 155a; *United States* v. *Pearson*, 258 F. Supp. 686 (S.D.N.Y. 1966); C.P.L.R. §§ 5202(a), 5234(b); *Knapp* v. *McFarland*, 462 F.2d 935, 938 (2d Cir. 1972) (dictum); *County National Bank* v. *Inter-County Farm Coop Ass'n*, 317 N.Y.S. 2d 790 (Sup. Ct. Sullivan Cty. 1970).

*** Meanwhile, Interpublic started accumulating the monthly payments due Harper pending a determination of the rights of Harper's creditors to that debt. The debt due to Harper as of May 23, 1974, the date of the District Court's judgment, was $224,999.70. Since the judgment, five installment payments of $8,333.00 have been paid to the IRS totalling $41,665.00. If Harper remains alive until the last payment is due, he will be entitled to receive an additional $216,885.30 in installments.

The IRS, shortly before October 18, 1972 but after October 3, 1972, learned of a third possible address for Marion Harper and listed it on a Notice of Levy and Final Demand which were served on Interpublic on October 18, 1972 (66a-67a). The address was "c/o Peter Notz, La Crique, 1196 Grand, Switzerland" although it was unknown whether that "care of" address was any better than the other "care of" address listed on the same document—"c/o Lane, 280 Madison Avenue, New York, New York 10016."

As a result of learning a third possible place of residence for Harper, this one in a foreign country, the IRS caused to be filed a Notice of Federal Tax Lien with the Recorder of Deeds in Washington, D.C. on January 17, 1973. See 26 U.S.C. § 6323(f)(2)(B). This is the appropriate place where the taxpayer may be a foreign resident. While a copy of this Notice of Federal Tax Lien was inadvertently omitted from the record below, we annex a copy of this publicly filed document as an addendum to this brief.

On the motion in the District Court for summary judgment, Corwin's attorneys could only say that the address at 280 Madison Avenue was a commercial office building and could not have been a residence (121a). Corwin ignores the fact that Harper had stayed at the New York Sheraton more than two weeks in September 1972 and that he had then given as his "home" the address of his parents in Oklahoma City. Corwin ignores the fact that Harper had previously given his address as the Waldorf Towers and The Metropolitan Club in New York City.

In this Court, Corwin now changes its tack and contends that it is undisputed that Harper was a resident only of Switzerland (Br. pp. 2, 6); but Corwin ignores the statement made in its own papers in the District Court where it was admitted that it had tried, without success to locate Harper (125a). In the District Court, Corwin's papers

did not even suggest that Harper resided in Switzerland at any time, let alone on October 3, 1972, the date of the IRS filings. The first indication that Harper might have an address in Switzerland arose *after* October 3, 1972 (66a; 67a) but before the IRS served final demands on Interpublic.*

There was no suggestion by anyone, that the Switzerland address (c/o Peter Notz, La Crique, 1196 Grand, Switzerland) is not a commercial address or that it is in any way a more reliable means of notifying Harper's creditors than the New York and Oklahoma addresses which were the ones last known to the IRS on October 3, 1972.

Culbertson, on November 30, 1972, obtained a default judgment against Harper in the amount of $608,180.90 (87a). It delivered an execution to the Sheriff on February 5, 1973, thereby perfecting its judgment lien against Harper's personal property under New York law. (*Ibid.*)

While Culbertson is appealing on the "strength" of Corwin's papers, it appears quite obvious that Culbertson cannot succeed even on Corwin's erroneous contention that Harper was unquestionably a resident of Switzerland. The IRS filed in every conceivable place of Harper's residence before Culbertson perfected his judgment lien on February 5, 1974.**

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* Corwin offered no evidence that Harper did not reside in New York City or Oklahoma City on October 3, 1972, nor any proof that Harper did in fact reside in Switzerland. Moreover, it should not be necessary for the IRS to file at every residence; it is sufficient to file at a residence.

** In the District Court Culbertson did not claim a priority (141a); as the District Court noted: "Culbertson, evidently, sits and hopes" (145a). Culbertson made no submissions on the motions for summary judgment (162a).

Prior Proceedings

Corwin instituted proceedings on November 27, 1972 in the New York State Supreme Court to have the funds purportedly covered by its execution served on Interpublic turned over to it. On June 5, 1973, the Supreme Court entered a judgment ordering that within 30 days, Corwin shall institute a proceeding pursuant to C.P.L.R. § 5239 for a determination of priority of liens on Harper's property—naming the United States and the judgment creditors as well as giving Harper notice of the proceedings. The Court also ordered Interpublic to set aside in a special account any sums due Harper until such deposits may satisfy Corwin's judgment.

On or about April 23, 1973 (even before the entry of the above judgment), Corwin commenced the present action to determine the priority of liens pursuant to C.P.L.R. § 5239 and in accordance with the terms of the judgment. A fund of $60,000 had been set aside by Interpublic.

The Government removed the action to Federal Court and, after several adjournments, all parties having any interest answered and cross-claimed or counterclaimed. On November 20, 1973, Corwin moved for summary judgment. On December 7, 1973, the Government similarly moved for summary judgment.

The Opinion Below

Judge Lasker in his lengthy opinion below (139-160a), reported at 375 F. Supp. 186, granted the United States a first priority as to the accrued installments due Harper pursuant to his contract with Interpublic as well as to future installments due Harper when and if such installments came due. In doing so he held that the IRS had perfected its tax lien for 1968 income taxes by filing, on April 15, 1970, its Notice of Federal Tax Lien (then in the amount of $394,692.55) with the Westchester County

Clerk, the county within New York State in which it is undisputed that Harper then resided (141-142a).* There is no dispute on this appeal that the Government must be paid first by Interpublic until Harper's 1968 income tax liability has been fully paid. This has already occurred. The balance presently due the Government on the assessments for 1963, 1964 and 1965 taxes (including statutory additions) totals $186,873.41 as of October 15, 1974.

Judge Lasker went on to hold that the Internal Revenue Service had perfected its lien for 1963, 1964 and 1965 federal income taxes, which totalled $168,895.90 and which were assessed on September 29, 1972, by filing a Notice of Federal Tax Lien with the Register of the City of New York on October 3, 1972 at 10:32 A.M.—some 2 hours and 19 minutes before Corwin perfected its judgment lien by delivering an execution to the Sheriff of New York County to enforce its judgment in the amount of $52,346.00 (143a).

The District Court held that it was undisputed that the taxpayer's actual residence at the time the IRS filed its Notice of Federal Tax Lien on October 3, 1972, "[could] not be determined" (147a), that "his residence . . . was . . . unknown" (or he ". . . [made] . . . himself scarce") (148a), and that Harper was "without a verifiable residence" (149a).

The District Court, noting that there is no specific authority on the question, held that in cases such as Harper's, the IRS should not be placed in a position where it "can *never* perfect a tax lien unless it files in the taxpayer's

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* The IRS also filed a Notice of Federal Tax Lien for 1968 income taxes in New York City on January 12, 1971. This is not relevant to the perfection of the already-perfected lien for 1968 taxes. It was filed because Harper was then residing at least part-time at the Waldorf Towers (95a).

demonstrable county of residence"* (147a; emphasis in original). Such a result, which would follow from the adoption of Corwin's position, "would allow tax evasion by the mere disappearance of the taxpayer" (148a). Judge Lasker held that result to be contrary to the purpose and policy of 26 U.S.C. § 6323 "that tax liens are favored over judgment liens" (149a) and that one purpose of the "residence" language in 26 U.S.C. § 6321 was to alleviate the heavy administrative burden on the IRS to collect taxes and perfect liens against taxpayers throughout the country (150a).

The District Court found that New York was the situs of the debt to Harper as well as his last known address (150a). Judge Lasker noted that the filing in New York was "reasonably calculated, under all circumstances, *to apprise interested parties* of the pendency" of the tax liens against Harper (emphasis in original; quoting *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)). He also observed that no stricter standard of notice should be applied to the Government than is applied to a New York judgment creditor such as Corwin who perfected his judgment lien by filing it with the Sheriff in New York County.

Judge Lasker concluded that there was no point to "deem"** the taxpayer's property to be at his actual residence when his actual residence was unknown because he was transient but where the situs of the property was actually known and where it also happened to be his last known county of residence (149-150a).

Judge Lasker adopted the Government's contention that based upon common sense and the policy of the

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* It is especially important that the IRS not be placed in such a position with respect to fleeing taxpayers who also may be involved with violating the criminal law.

** See 26 U.S.C. § 6323(f)(2).

Internal Revenue Code that "due diligence" or "substantial compliance" with the residence provision of 26 U.S.C. § 6323(f)(2) had been shown by the IRS and that it had perfected its lien for 1963, 1964 and 1965 income taxes owed by Harper and was entitled to first priority in the distribution of Interpublic's debt to Harper.

ARGUMENT

The filing of Federal Tax Liens in Oklahoma City and New York City gave the IRS priority over Harper's judgment creditors whose liens were perfected after the IRS filings.

The sole issue on this appeal is whether the IRS filed its Notices of Federal Tax Liens as to Harper's 1963, 1964 and 1965 taxes ($168,895.90 plus statutory additions) in the proper places in order to perfect its tax liens against Harper's property as against Corwin, a competing but later-perfecting judgment lien creditor of the taxpayer.*

It is undisputed that Harper was a transient with no verifiable address on October 3, 1972, the date the IRS filed in New York and Oklahoma City. There is also no dispute that the IRS, in September 1972, had made diligent efforts to locate Harper and had thus discovered that during the first two weeks of September Harper had stayed at The New York Sheraton Hotel and had then given his current "home" address as Oklahoma City, which also happened to be the home of his parents.

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* The other appellant, Culbertson, cannot recover anything by virtue of the fact that there is no dispute that the IRS filed at every conceivable residence of Harper (in New York City, Oklahoma City and Switzerland) before Culbertson perfected his judgment. The last of these filings (for Switzerland) occurred on January 17, 1973. Culbertson did not perfect his judgment lien until February 5, 1973.

The IRS, on earlier occasions, had discovered that Harper had stayed at the Waldorf Towers in New York City (95a; 97a) and had given his address as "c/o Lane, 280 Madison Avenue, New York, N.Y. 10016" (103a; 104a; 105a; 106a; 107a) as well as staying in various hotels, the most recent of which was the New York Sheraton.

Not only did the IRS file at Harper's two last known addresses before Corwin perfected its judgment lien (which it could have done months earlier and avoided this battle), but New York was also the situs of the Interpublic debt to Harper as well as the location of the various competing creditors of Harper. It was unquestionably the best place to give everyone concerned notice of the federal tax liens against Harper.*

26 U.S.C. §§ 6321 and 6323 prescribe the procedure for the perfection of a federal tax lien. § 6321 provides:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

A § 6321 lien has priority against judgment creditors if notice has been filed in accordance with § 6323, which provides in relevant part:

> "(a) The lien imposed by section 6321 shall not be valid as against any . . . judgement lien creditor un-

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* Interpublic in fact was given actual notice of the lien before Corwin even presented his execution to the Sheriff of New York County (860a; 105a-107a).

til notice thereof which meets the requirements of subsection (f) has been filed by the Scretary or his delegate.

* * * * *

(f) (1) The notice referred to in subsection (a) shall be filed—

(A) (ii) In the case of personal property, whether tangible or intangible in one office within the State (or the county, or other governmental sub-division), as designated by the laws of such State, in which the property subject to the lien is situated.

* * * * *

(2) For the purpose of paragraph (1), property shall be deemed to be situated—

* * * * *

(B) In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed. . . ."

It should be noted that the term "residence" as used in section 6323 is not defined by the Code. This omission creates a significant ambiguity in this section since the term may be given widely varying meanings depending on its context and the intended statutory purpose. See, for example 25 Am. Jur. 2d *Domicil* § 4, which defines residence as being of a "temporary, permanent, or transient character . . . Thus, in some instances, residence requires mere physical presence, while in others something more than physical presence is required and the element of intent becomes material, even where 'residence' is not deemed to be the equivalent of 'domicil'." Because the term "residence" is a creature of statutory context, it is inappropriate to apply conflicting state law or other federal law definitions to section 6323 of the Internal Revenue Code.

The Court of Appeals for the District of Columbia has noted in another context:

> "The Act before us does not define 'residence,' but as we have had occasion to point out:
>
> > 'It is axiomatic that residence is not a term of fixed legal definition but takes on shades of meaning *according to the statutory framework in which it is found*'." (emphasis in original; footnotes omitted)

Chien Fan Chu v. *Brownell*, 247 F.2d 790, 794 (D.C. 1957).*

See also, 84 C.J.S. *Taxation* § 309, pp. 641-42:

> "The question as to the meaning of the term 'residence', where the construction of a taxing statute is involved, is to be determined in the light of the legislative purpose and the context."

A determination that "residence" means "last known address" or "last known residence" is consistent with other provisions of the Code which permit the assessment procedure to be commenced by the mailing of a notice of deficiency and a final demand for payment to a taxpayer's "last known address". 26 U.S.C. §§ 6212 and 6303.

The consequences of the notices provided in these sections are far more severe than the consequences in the instant use. In those situations assessments result which permit administrative seizure of the taxpayer's property. In the instant case, the construction of the word "residence" governs merely *who* will get the taxpayer's property—the Government for the benefit of the public, or a less-diligent judgment creditor.

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* The District of Columbia Circuit's approach to statutory construction in order to avoid an "absurd" construction in *Chien Fan Chu* was noted with approval by this Circuit in *Leong Leun Do* v. *Esperdy*, 309 F.2d 467, 472, 476-77 (2d Cir. 1962) (includes concurring opinion).

As the Court in *United States* v. *Ball*, 326 F.2d 898, 900 (4th Cir. 1964) stated:

> "The notice sections of the Internal Revenue Code, 26 U.S.C.A. §§ 6303(a) and 6212(a), which we discuss more fully hereafter, both permit notice to be sent to the taxpayer's 'last known address'. This we deem to be evidence of Congressional intent that the Government's right to collect taxes due and owing to the United States *may not be defeated by the flight of a taxpayer before or after a deficiency assessment is made. . . .*" (emphasis supplied.)

See *Luhring* v. *Glotzbach*, 304 F.2d 556 (4th Cir. 1962) which holds that the address last known to the agent in the District is sufficient although there may be more recent information in the possession of other IRS agents in other Districts. See also, *DeWelles* v. *United States*, 378 F.2d 37 (9th Cir.), *cert. denied*, 389 U.S. 996 (1967), cited with approval by this Circuit in *Bauer* v. *Foley*, 404 F.2d 1215, 1220 (2d Cir. 1968), *modified on rehearing*, 408 F.2d 1331 (1969). In *DeWelles*, the taxpayer was bound by the last address orally told to IRS agents despite the fact that his most recent tax returns filed before the oral statements gave a different, albeit the correct, address.

Had Congress chosen to rigidly define the word "residence", it would have increased the degree of certainty and provided greater assurance of notice to creditors. Such a definition could concededly have been used after the fact to challenge the IRS's determination of residence. The fact that Congress did not employ a rigid definition provides some indication that the standard should be kept flexible and the balancing test mentioned above should be employed on a case-by-case basis. Congress did not limit the term "residence" to the principal residence of an individual taxpayer as it did in the case of corporations. Thus, if the taxpayer has multiple residences, we believe

that the IRS may file its notice of lien at any, but need not file at all, of his residences.* Likewise, since Congress rather clearly intended to provide *some* place to file the notice of lien regardless of how transient were the taxpayer's various abodes, we presume that Congress would not have defined the term so as to preclude some taxpayers (frequently those who are criminals or who might incur large income tax liabilities) from having a residence.

In the case of a transient taxpayer we submit that the IRS may file at the last known address, if a search for such address has been conducted with due diligence. In a situation where the taxpayer was constantly on the move, there is little likelihood that competing creditors will receive notice of the tax lien regardless of where it is filed. In these circumstances the court must choose between the policy of the statute in favor of facilitating filing by the Government and the contrary policy in favor of providing notice to creditors. The choice in favor of the former should be clear since the latter objective can rarely be achieved in any event. Indeed, filing is merely *constructive* notice. The meaning for "residence" under § 6323 in the case of a transient or fleeing taxpayer as one requiring only the last known address which has been determined with due diligence meets the test of "substantial compliance" for the filing of tax liens. The "substantial compliance" test has been previously recognized. As Judge Weinfeld has observed with respect to the adequacy of filing federal tax liens:

> "The essential purpose of the filing of the lien is to give constructive notice of its existence. The test is not absolute perfection in compliance with the statutory requirement for filing the tax lien, but whether there is *substantial compliance* to give con-

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* It is without question that in most contexts a person may have multiple residences. See Black's Law Dictionary (10th ed.), p. 1473 (examples).

structive notice to alert one of the government's claim." (footnotes omitted) *United States* v. *Sirico*, 247 F. Supp. 421, 422 (S.D.N.Y. 1965).*

The concept of due diligence and giving notice at a last known address similarly is not unknown to the law. In the area of bills and notes, the proper place to have sent notices under the Negotiable Instruments Act is the last known residence where the residence of the person to whom notice is to be given is unknown after the use of reasonable and prompt diligence to determine that address. Such notice is sufficient even if it later turns out to have been incorrect. See 10 C.J.S. *Bills and Notes* § 497, pp. 920-924.

There is also an element of estoppel which is involved in the present analysis. Where a person holds himself out to the public or allows others to hold him out as a resident of a certain place (Harper held himself out as a resident of Oklahoma City) and thereby deceives the parties as to his residence, he is estopped to deny the fact, and notice sent to that place will be deemed sufficient. 10 C.J.S. *Bills and Notes* § 396, p. 918. In the case of the filing of federal tax liens, the IRS is required to rely upon statements of the taxpayer as to residence if it is to do its job at all efficiently. A competing and less diligent creditor should not be preferred because the transient or fleeing taxpayer may also have lied about his residence.**

In addition, we submit that a presumption of regularity should attach to an administrative act such as the filing of the tax lien and that the burden should be upon the

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* *Sirico* was decided before the enactment of the 1966 Tax Lien Act. The 1966 Act was designed to shift the emphasis and to make it easier for the IRS to file its notice of lien in one place and, secondarily, to give general creditors the best possible constructive notice. See Senate Report No. 1708, 1966 U.S. Code Cong. & Adm. News 3731-33.

** It should be added that there is no evidence that Harper was not a resident of Oklahoma City on October 3, 1972.

creditor to prove that the IRS filings were in the wrong place, that the taxpayer had a residence elsewhere, and that such residence was known or should have been known by the IRS in the exercise of due diligence. See *United States* v. *Lorson Electric Co.*, 72-2 U.S.T.C. ¶ 9615 (S.D. N.Y. 1972), *aff'd*, 480 F.2d 554 (2d Cir. 1973). In situations such as this, where a creditor of a taxpayer seeks to challenge the technical validity of a tax lien, the burden is upon such creditor. See *Falik* v. *United States*, 343 F.2d 38 (2d Cir. 1965).

In the case at bar, by no stretch of the imagination did Corwin carry or even attempt to undertake, such a burden. In the instant case both the Government and Corwin perfected their liens in the same locale, where they also searched for the taxpayer, sought and, in fact, found his property. In these circumstances, we fail to see what objective could be achieved by requiring the IRS to file elsewhere, especially where there is no clear basis for doing so.

In fact, the filings also took place at the situs of Interpublic's debt to Harper. Judge Lasker relied upon this as determinative, finding that under the circumstances of this case and in light of the policy of the statute, filing in New York City constituted due diligence and substantial compliance.*

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* It is clear that Judge Lasker's reliance on *Mullane*, *supra*, in approving the diligent procedures followed by the IRS here was not misplaced. As recently as *Eisen* v. *Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (May 28, 1974), the Court observed, with respect to the adequacy of notice to members of a putatative class, that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained *through reasonable effort.*" (Emphasis supplied.) 42 U.S.L.W. at 4809. *See* also, *Glover* v. *McMurray*, 487 F.2d 403, 407 (2d Cir. 1973).

Judge Lasker's reasoning was well-founded, for 26 U.S.C. § 6323(f)(1)(A)(ii) permits filing in the place where *"the property subject to the lien is situated."*

26 U.S.C. §6323(f)(2)(B) permits the Internal Revenue Service to "deem" personal property to be situated in the place where the taxpayer resides. The purpose of that section is to facilitate collection of taxes because generally it is easier to locate a person's place of residence (or one of his residences) rather than to find each item of his personal property or to determine his one domicile. One or both of these difficult tasks were necessary under prior law. A secondary purpose was to permit general creditors the best possible opportunity to receive notice of the tax lien. See Senate Report No. 1708, 1966 *U.S. Code Cong. & Adm. News* 3731-33. Here, where the IRS has filed at a fleeing taxpayer's last known address and where the situs of specific personal property does not have to be "deemed", but is in fact known and undisputed, it is respectfully submitted that the Government has done all that is required in perfecting its lien. It has given notice in the best of all places, after due diligence, in substantial compliance with the statute and its purpose.

This is especially so for an itinerant taxpayer or one who is hiding his residence or residences, thus making the perfection of federal tax liens impossible if Corwin's strict approach is adopted by the Court.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the judgment of the District Court be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America, Respondent-Appellee.

MEL P. BARKAN,
GERALD A. ROSENBERG,
Assistant United States Attorneys,
Of Counsel.

November 1, 1974

ADDENDUM

Form 668 (Rev. 10-71)

DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE

NOTICE OF FEDERAL TAX LIEN UNDER INTERNAL REVENUE LAWS

For Optional Use By Recording Office

DISTRICT Manhattan

SERIAL NUMBER C-27405

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer.

NAME OF TAXPAYER Marion Harper Jr.

RESIDENCE c/o Peter Notz- La Crique, 1196 Grand, Switzerland and/or La Crique, Grand Vaud, Switzerland

KIND OF TAX (a)	TAX PERIOD ENDED (b)	DATE OF ASSESSMENT (c)	IDENTIFYING NUMBER (d)	UNPAID BALANCE OF ASSESSMENT (e)
1040	12-31-68	11-28-69	042-16-1391	198,996.38
1040	12-31-63	09-29-72	042-16-1391	85,690.08
1040	12-31-64	09-29-72	042-16-1391	59,038.81
1040	12-31-65	09-29-72	042-16-1391	24,080.77
			TOTAL	$ 367,805.54

PLACE OF FILING Recorder of Deeds, District of Columbia, Washington, DC

WITNESS my hand at 120 Church St. New York, NY, 10007, on this, the 3rd day of January, 19 73

SIGNATURE Gerald Snyder

TITLE Revenue Officer

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien G.C.M. 26419, C.B. 1950-51, 125.)

73 JAN 17 AM 10 49

★ U. S. Government Printing Office 1974— 614—207—53

Form 280 A-Affidavit of Service by Mail
Rev. ^/72

73 Civ 1978 MEL

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 1st day of November 1974 s he served 2 copies of the within

govt's brief

by placing the same in a properly postpaid franked envelope addressed:

1) Benedict Ginsberg, Esq., 475 Fifth Ave. NY NY 10017
2) Mfass, Levy, Friedman, Hirsch & Stern, Esqs., 100 Park Ave. NY NY 10017

1 cy to Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., 345 Park Ave. NY NY 10022

And deponent further says she sealed the said envelope s and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

1st day of November 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975